IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.590 OF 1994

IN

SUIT NO.942 OF 1973

Bomi Munchershaw Mistry of Bombay Indian Inhabitant residing at Manech-Abad, 26-F, Nepean Sea Road, Bombay 400 036. ..Appellant.

V/s.

1. The Kesharwani Co-operative Housing Society Ltd., a society registered under the Maharashtra Co-operative Societies Act, 1960 (Registered No.B/2894/60) and having its registered office at 26, Nepean Sea Road, Bombay - 400 036.

2(a) Lalchand Hirachand (Original Defendant No.2) of Bombay Indian Inhabitant (Receiver appointed by the Bombay High Court in suit No.304 of 1954), by his legal representatives at Neela House, G. Deshmukh Marg, Bombay - 400 026 and having their office at Construction House, Ballard Estate, Bombay - 400 001.

2(b) Vinod Doshi and other heirs of Lalchand Hirachand (Original Defendant No.2 who had been impleaded in the suit as Receiver appointed by the Bombay High Court in Suit No.304 of 1954) care of Construction House, Ballard Estate, Bombay - 400 001.

3. Rajesh Ratanchand Doshi
4. Arvind Ratanchand Doshi

both of Bombay Indian Inhabitants Executors and Trustees of the late Ratanchand Hirachand dated 13th August,1979 having their office at Construction House, Ballard Estate, Bombay-400 001.)

5. Pankaj Gajendra Zaveri, Indian Inhabitant the son and heir of the late Gajendra Gopaldas Zaveri (Original Defendant No.4) residing Breeze Society Building, C/6, Flat 11, Jeevan Bima Nagar (LIC Colony), Borivali(West), Bombay 400 103.)

6. Kirit Gajendra Zaveri, Indian Inhabitant the other son and heir of the Original 4th Deft. care of Pankaj G.Zaveri, Breeze Society Building, C/6, Flat 11 Jeevan Bima Nagar (LIC Colony) Borivali(West), Bombay 400 103.)

7. Dadi Sorabji Mistry of Bombay Indian Inhabitant, residing at 32,Sleater Road,Bombay 400 007.)

8A. Jamshed Hormusji Wadia of Bombay Indian Inhabitant residing at Bakhtawar, N. Dabholkar Road Bombay 400 006 being the third trustee of the Deed of Settlement dated 17-3-1961.

(Respondents 7 and 8A being the surviving Trustees of the Deed of Settlement dated 17.3.1951.

9A. Bomi M. Mistry
9B. Homi B. Mistry
9C. Naushad B. Mistry

[Respondents 9A, 9B & 9C being the executors of the Will of the deceased Respondent No.9 (Original Defendant No.7)]) ..Respondents.

Mr.R.Dada, senior advocate with D.J.Khambatta i/b. Payne & Co. for appellants.

Mr.J.B.Chinai, senior advocate with Sanjay Jain, Swapnil Bangur and Darshan Mehta i/b. D.Liladhar & Co. for respondent No.2.

Ms.A.B.Kapadia, advocate i/b. Dafatary, Feriera & Divan for respondent Nos.3 & 4.

Mr.F.D'Vitre, advocate with Mohan Salian i/b. Gagrat & Co. for respondent Nos.7 & 8A.

AND

CROSS OBJECTION (L) NO.4 OF 1996
IN
APPEAL NO.170 OF 1994
IN
L.C. SUIT NO.942 OF 1973

1. Dadi Sarabji Mistry of Bombay Indian Inhabitant, residing at 32,Sleater Road,Bombay 400 007.

2. Adi Maneckshaw Cooper of Bombay Indian Inhabitant, residing at Baria Building No.1, Gamadia Colony, Tardeo, Bombay-7 **(deleted)**

(being two of the present Trustees of the Deed of Settlement dated 17-3-1951)

..Appellants Nos. 1 & 2 to the Cross Objections (Orig. Defendant Nos.5 & 6).

V/s.

1. Rajas Ratanchand Doshi

2. Arvind Ratanchand Doshi

both of Bombay Indian Inhabitants the Executors and Trustees under the Will dated 13th August, 1979 of the late Shri Ratanchand Hirachand having their office at Construction House, Ballard Estate, Bombay 400 001.

3.	The Kesharwani Co-operative Housing Society Ltd.,a society registered under the Maharash-tra Co-operative Societies Act, 1960 (Registered No.B/2894/60 and having its registered office at 26, Napean Sea Road, Bombay 400 006.	..Respondents Nos. 1 to 3 (Orig. Defendant Nos. 3A, 3B and 1).
4.	Bomi Munchershaw Mistry	..Respondent No.4. (Orig. Plaintiff)
5.	Shernavaj Munchershaw Minstry **(deleted)**	
5A.	Bomi M. Mistry	
5B.	Homi B. Mistry	
5C.	Naushad B. Mistry [Respondents 5A, 5B & 5C being the executors of the Will of the deceased Respondent No.5 (Original Defendant No.7)]	
6.	Geeta (alias Dhun) Hiroo Chainani the last five are of Bombay Indian Inhabitants residing at Manech-Abad, 26-F, Nepean Sea Road, Bombay 400 03.	..Respondent. (Orig.Defendant).

Mr.F.D'Vitre, advocate with Mohan Salian i/b. Gagrat & Co. for cross-objectionists.

Mr.R.Dada, senior advocate with D.J. Khambatta i/b. Payne & Co. for respondent No.4.

Mr.J.B.Chinai, senior advocate with Sanjay Jain, Swapnil Bangur and Darshan Mehta i/b. D. Liladhar & Co. for respondent No.3.

Ms.A.B.Kapadia, advocate i/b. Dafatary, Periera & Divan for respondent Nos.1 & 2.

CORAM : R.M. LODHA AND
J.P. DEVADHAR, JJ.

DATED : 29TH JUNE, 2005.

JUDGMENT (Per J.P. Devadhar, J.)

1. The issue raised in Appeal No.590 of 1994 and in cross objection (L) No.4 of 1996 filed in Appeal No.170 of 1994, being common, both these matters are heard together and disposed of by a common Judgment. The cross objectionists are the surviving trustees of the Trust created under a deed of settlement dated 17/3/1951. The appellant in appeal No.590 of 1994 is a beneficiary and reversioner under the aforesaid trust. Both the appellant (hereinafter referred to as 'the plaintiff') and the cross objectionists have common interest in these proceedings.

2. The sole grievance of the plaintiff and the cross objectionists in these proceedings is that the learned trial Judge grossly erred in declining to cancel the deed of conveyance dated 31/3/1967 executed by Lalchand Hirachand (original defendant No.2) in favour of Kesharwani Co-operative Housing Society (original defendant No.1) even after holding that the said deed was ante dated with a view to defraud the revenue and that the said deed casts a cloud on rights of the plaintiff to enjoy the trust property. By the impugned Judgment dated 3/12/1992 passed in Suit No.942 of 1973, the learned

trial Judge, instead of cancelling the deed of conveyance, declared that the said deed of conveyance dated 31/3/1967 shall be inoperative and of no effect to the extent it expressly or by implication seeks to whittle down the rights of the adjoining land owners namely the trustees under the deed of settlement dated 17-3-1951, its beneficiaries and reversioners (including the plaintiff).

3. The facts relevant for the purpose herein are that prior to 1951, Ratanchand Hirachand was owner of a bungalow known as Ratan Villa with outhouse, guest house, servant quarters and garages constructed on a large piece of land admeasuring about 6000 to 7000 sq.yds. bearing City Survey No.2/590 and 2A/590 situated at Napean Sea Road, Bombay.

4. By a deed of conveyance dated 20th March, 1951, the said Ratanchand Hirachand sold 565 square yards of land being part of City Survey No.2/590 to Munchershaw P.Mistry and others (Trustees under a Deed of Settlement dated March 17, 1951). The said conveyance deed contained restrictive covenants to the effect that Ratanchand Hirachand, his heirs, executors, administrators and associates and all persons desiring and claiming title from him shall not build any structure

at any time thereafter higher than the then existing garages on the remaining land bearing Survey No.590 (Part) nor any structure in front of towards South or on the Central passage or in the garden in front of the property known as Ratan Villa as more particularly set out in the plan annexed thereto.

5. During the period 1954-55, a building named ‘Maneck-Abad’ consisting of ground plus two floors was constructed on the plot of land purchased by the Trust under the deed of conveyance dated 20th March, 1951. The plaintiff is residing at Maneck-Abad as the beneficiary and as a reversioner and the plaintiff is entitled to a share in the corpus of the said trust created under the Deed of settlement dated March 17, 1951.

6. Ratanchand Hirachand had filed a suit bearing Suit No.304 of 1954 in the High Court at Bombay seeking partition of the joint family properties including the property on which Ratan Villa bungalow existed. In that suit, Lalchand Ratanchand was appointed as a private Receiver in respect of the lands belonging to Ratanchand Hirachand.

7. The said Lalchand Hirachand entered into an agreement with G.G.Zaveri on 2nd July, 1966 (Exhibit ‘A-

111') for sale of 5325 square yards of land bearing City Survey No.590(Part) together with structures standing thereon for Rs.21,50,000/-. Clause 2 of the said agreement for sale provided that the said Lalchand shall at the time of completion of sale give to Zaveri vacant possession of the entire property agreed to be sold and shall also remove the restrictive covenants attached to the said property under the conveyance dated 20th March, 1951.

8. The said G.G.Zaveri in turn entered into an agreement with Kesharwani Co-operative Housing Society Limited on 23rd July, 1966 (Exhibit A-112) for sale of the lands which he had agreed to purchase from Lalchand, for a total consideration of Rs.25,00,000/-. Clause (9) of the said agreement for sale dated 23rd July, 1966 reads as under :

> "9. The Vendor has agreed with Manchersha Phiroze Mistry and the owner of the adjoining property to give to them lease of 400 sq.ft. of land as shown on the plan hereto annexed and thereon surrounded by green coloured boundary line for a period of 98 years at the monthly rent of Rs.10/- on the Lessees agreeing to keep the said land unbuilt upon and open to the sky in consideration of the said Lessees agreeing to waive the covenant against the height restriction on the main bungalow. The purchaser shall abide by the said agreement and shall be entitled to the benefit and bounded by the burden thereof."

9. Thereafter, by a deed of conveyance (Exhibit-J)

Lalchand Ratanchand (hereinafter referred to as ‘the vendor’) conveyed 5765 square yards of land bearing City Survey No.590 (part) to the Kesharwani society (hereinafter referred to as ‘the purchaser’) for Rs.21,50,000/-. Mr.G.G.Zaveri was shown as a confirming party in the said deed of conveyance. Although the said deed of conveyance was dated 31/3/1967, the plaintiff came to know that the said deed of conveyance was actually executed on 30/11/1967 but the same was ante dated with a view to defraud the revenue. Moreover, the plaintiff noticed that the plan annexed to the said deed of conveyance wrongfully and illegally purported to convey part of the adjoining land to which the plaintiff was entitled to as beneficiary under the trust deed dated 17/3/1951. Further the said conveyance deliberately omitted to incorporate the restrictive covenants attached to the lands which prejudically impaired the rights of the plaintiff to enjoy the trust property.

10. In these circumstances, the plaintiff filed Suit No.891 of 1970 in the High Court at Bombay on 5/12/1970 against the purchaser society and the vendor inter alia seeking a declaration that the purchaser society has no right, title and interest in respect of the portion of the Trust property shown delineated in yellow hatched lines on the plan annexed as Exhibit-B to the said

plaint and a declaration that the property shown in yellow hatched lines in that plan belongs to the trustees under the Deed of Settlement dated 17/3/1951. The plaintiff sought further declaration to the effect that in view of the restrictive covenants contained in the conveyance deed dated 20/3/1951 the purchaser society is not entitled to build any structure higher than 13 feet - 1.1/2 inches on the land purchased by them under the impugned deed of conveyance dated 31st March, 1967.

11. During the pendency of the aforesaid suit, the plaintiff filed another suit in the City Civil Court at Bombay on 27/3/1973 seeking a declaration that the deed of conveyance dated 31st March, 1967 is void and an order for cancellation of the said deed inter alia on the ground that the said conveyance was ante dated with a view to defraud the revenue and such a document executed in contravention of the public policy is liable to be cancelled. The said suit was returned by the City Civil Court for being presented before the proper Court. Thereupon, the said suit was filed in the High Court at Bombay on 21/9/1973 and was numbered as Suit No.942 of 1973.

12. Both the above suits filed by the plaintiff i.e. Suit No.891 of 1970 as well as Suit No.942 of 1973

were heard together and by a Judgment and order dated 3/12/1992 passed in Suit No.891 of 1970 the learned trial Judge decreed the suit by passing the following order:-

"(i) Declared that Defendant 1 is not the owner of the land shown by yellow hatched lines in Ex.B (being an annexure to the plaint) and that this land belongs to the trustees, the beneficiaries and the reversioners (including plaintiff) of the deed of settlement dated 17.3.1951. Defendant 1 is permanently prohibited from laying any claim to this land or interfering with the possession and enjoyment thereover of the trustees, beneficiaries and reversioners inclusive of plaintiff aforementioned.

(ii) Defendant 1 is prohibited from erecting any structure exceeding in height 13'- 1.1/2" on the vacant land of the erstwhile Ratan Villa as it was on 20.3.1951. This prohibition, which shall be perpetual is restricted to the said land whether buildable or otherwise according to building regulations of any authority - then or now in force. Declared that this restraint shall operate perpetually in favour of the trustees, beneficiaries or reversioners including plaintiff and / or their successors as the case may be. Defendant 1 do remove from the land vacant as on 20.3.1951 any structure put after 20.3.1951 in Ratan Villa campus. This removal be effected in six weeks as from this day. In the event of the above directive not being complied with, plaintiff will be entitled to get an order for such removal in execution and the expense therefor shall be saddled upon defendant 1.

(iii) Defendant 1 perpetually restrained from putting any structure or cluttering up with mobile objects the portion in front towards south, the central passage or garden shown in burnt-sienna colour in Plan B to Ex.B dated 20.3.1951. This area shall be kept unbuilt upon and in the state it was on 20.3.1951.

(iv) Ex.B to the plaint and Plans A and B to Ex.B dated 20.3.1951 shall form part of the decree. Plaintiff to furnish copies of the said exhibit and plans.

(v) Plaintiff to get 3/4ths of his costs from defendant 1 and bear the remaining 1/4ths himself. Defendants do bear their own costs. "

13. By another Judgment and order also dated 3rd December, 1992 the trial Judge decreed the Suit No.942 of 1973 by passing the following order :-

"Declared that Ex.J is inoperative and of no effect to the extent it expressly or by implication seeks to whittle down the rights, the owners and beneficiaries of Maneckabad (inclusive of plaintiff) have under Ex.B. Copies of the two conveyances to be annexed herewith. Defendants 1 and 2 shall pay the costs of the plaintiff. These defendants, as also the remaining ones, shall bear their own costs - those of the trustee-defendants 5 and 6 to come out of the trust funds. Let a copy of that part of the judgment which deals with defendant 2’s evasion of proper tax on capital gains, be sent to the Commissioner of Income Tax Bombay for such action as may be deemed necessary."

14. Both the vendor and the purchaser society have accepted the decree passed in Suit No.891 of 1970 as well as the decree passed in Suit No.942 of 1973. It may be noted that the legal representatives of the original vendor had filed Appeal No.170 of 1994 challenging the Judgment and decree passed in Suit No.942 of 1973 to the extent it holds that the deed of conveyance was ante dated by the vendor with a view to defraud the revenue. In that appeal, cross-objection was filed by the trustees to

challenge the decision of the learned trial Judge in so far as it pertains to declining to order cancellation of the deed of conveyance dated 31/3/1967. When the said appeal No.170 of 1994 was taken up for final hearing on 6/6/2005, the legal representatives of the vendor chose to withdraw the said appeal. Thus, in the absence of any challenge to the decree, the findings given by the learned trial Judge have attained finality against the vendor and the purchaser. The only surviving issue in these proceedings initiated by the plaintiff and the cross objectionists is, whether, the learned trial Judge was justified in declining to order cancellation of the deed of conveyance dated 31-3-1967.

15. Mr.R.A.Dada, learned senior advocate appearing on behalf of the plaintiff submitted that in the present case, the deed of conveyance dated 31st March, 1967 (Exhibit-J) has been found to be (a) ante dated with a view to defraud the revenue, (b) the plan annexed to the said deed illegally purports to convey part of the property belonging to the trust to which the plaintiff is entitled to as a beneficiary and reversioner under the deed of settlement dated 17/3/1951 and (c) the said deed deliberately omits to incorporate the restrictive covenant attached to the land in question. He submitted that once it is established that the deed Exhibit-J is ante dated

with a view to defraud the revenue and the said deed casts a cloud on the plaintiff's right to enjoy the trust property, the learned trial Judge ought to have cancelled the said conveyance as a matter of course. He submitted that the vendor in Exhibit-J was a receiver appointed by the Court and when a deed executed by an officer of the Court is found to be forged, then the public interest demands that such a fraudulently executed document should been cancelled. He submitted that the learned trial Judge committed an error in holding that although the plaintiff has proved that the deed of conveyance (Exhibit-J) is a fraud on the revenue and casts a cloud on the rights of plaintiff to enjoy the trust property, the proper remedy is to grant declaration and not cancellation of the deed Exhibit-J.

16. Elaborating his arguments, Mr.Dada submitted that the learned trial Judge has upheld the contention of the plaintiff that the conveyance deed (Exhibit-J) was ante dated on the basis of the following evidence on record :-

a) Although the deed of conveyance is dated 31/3/1967, the plan annexed to the said deed bears the date 30/11/1967. When the plan annexed to the deed was drawn on 30/11/1967,

obviously, the deed must have been executed on or after to 30/11/1967 and not on 31/3/1967.

b) The deed refers to a tripartite agreement dated 21/3/1967 (Exhibit-K) entered into by and between the vendor, Zaveri and the purchaser, wherein it is recorded that in view of the reduction of F.S.I. from 2 to 1.33 in respect of the lands in question, the consideration amount has been reduced from Rs.25,00,000/- to Rs.21,50,000/-. The said tripartite agreement refers to the excess payment of Rs.1.75 lakhs made by the society to the vendor. From the evidence on record, it is seen that, in fact, the payment of Rs.1.75 lakhs was made by the society on 5/7/1967. If the payment of Rs.1.75 lakhs itself was made by the society on 5/7/1967, it could not be stated in the tripartite agreement dated 21/3/1967 (Exhibit-K) that the society has made excess payment of Rs.1.75 lakhs. Since the tripartite agreement dated 21/3/1967 is referred in the deed dated 31/3/1967, it is evident that both the tripartite agreement as well as the deed of conveyance dated 31/3/1967 were ante dated.

c) By a letter dated 19th July, 1967 (Exhibit A -121 collectively) the advocate for the vendor had made a grievance to the advocate for Zaveri, that the conveyance deed has not yet been executed even though the draft conveyance has been approved on 29/3/1967.

d) In the audited annual accounts finalised by the society for the year ending 30th June, 1967, the property in question is not shown as an asset of the society but it is stated in the said accounts that the society has agreed to purchase the land and part payment has been made in respect thereof. Thus, from the aforesaid accounts it is clear that till 30th June, 1967 the deed of conveyance was not executed.

e) In the letter dated 30/11/1967 (Exhibit A-102) addressed to the society’s advocates it is recorded that on ‘that date’ i.e. 30/11/1967 the sale has been completed.

f) In the letter dated 20th December, 1968 (Exhibit A-104), advocate for the vendor had

informed the tenants that Ratan Villa property i.e. the property mentioned in the deed Exhibit-J has been sold to the society on 30th November, 1967.

g) Lalchand - an officer of the Court did not enter the witness box obviously for fear of being exposed.

17. Mr.Dada further submitted that the plaintiff has also established that the deed of conveyance (Exhibit-J) was ante dated with a view to defraud the revenue. He submitted that under the Finance Act 2 of 1967 applicable to the assessment year commencing from 1/4/1967 the income tax liability was enhanced. As result, the capital gains tax payable by the vendor on execution of the deed of conveyance on 30/11/1967 came to Rs.3,14,848/-. With a view to defraud the revenue and to evade the payment of capital gains tax amounting to Rs.3,14,848/-, the deed was ante dated to show as if the said deed was executed on 31/3/1967 (i.e. before the Finance Act 2 of 1967 came into force). The learned trial Judge has held that although the society is a party to the ante dating of the document, the society is not guilty of having abetted either the tax evasion or the forgery. According to Mr.Dada by ante dating the document not only

the vendor benefited but even the purchaser society was benefited as is evident from the following:-

(a) The society in connivance with the vendor had misrepresented to the Government and the Municipal authorities by addressing various letters including letter dated 16/10/1967 (Exhibit L-1) to the effect that the society had purchased the said property on the footing that F.S.I.-2 is available and accordingly, the conveyance has been executed by the vendor in favour of the society. Believing the said representation made by the society, the Government by its letter dated 9/2/1968 (Exhibit U-1) granted its approval of F.S.I.-2 to the society. It is only when the plaintiff exposed the fraud committed by the society by filing Writ Petition No.501 of 1968, this Court by its Judgment dated 13/3/1970 declared that the society had obtained Government approval to F.S.I.- 2 by fraud and accordingly cancelled the said approval. The said decision has been upheld by the Apex Court.

(b) The society agreed for ante dating the document as a quid pro quo to suppress the height

restriction. If the height restriction attached to the land in question were incorporated in the deed, then the society would have been bound by it. In a bid to suppress the restrictive covenant, the society in the agreement for sale dated 23/7/1966 (Exhibit A-112) entered in to with G.G.Zaveri, got inserted a clause to the effect that Manchersha P.Mistry trustee / owner of the adjoining land had agreed to waive the height restriction. In the deed of conveyance (Exhibit-J) there is no reference to such agreement of waiving height restriction by Manchersha P.Mistry. In the absence of challenge, Exhibit-J read with the agreement for sale dated 23/7/1966 would have by efflux of time given colour of waiver of height restriction to the land in question, when in fact, there was no such waiver of height restriction. The plaintiff has established that there could be no such agreement of waiver between Manchersha Mistry and Zaveri because Manchersha P.Mistry had died on 23/6/1962. Neither the vendor nor the society have produced any document to establish that Manchersha Mistry had in fact waived the height

restriction. Suppression of height restriction in the deed was beneficial to the society because in the absence of any such restriction the society could obtain marketable title certificate under the Maharashtra Ownership Flats Act, 1963 and thereby induce the intending innocent flat purchasers to purchase flats and create third party rights which would give rise to multiplicity of proceedings and cause serious prejudice to the plaintiff.

(c) The society agreed for ante dating the document as a quid pro quo for extension of time to make payment of the balance consideration. According to the agreement for sale entered into by and between the vendor and Zaveri on 2-7-1966, Mr.Zaveri was to pay the balance consideration amount within 9 months of the completion of sale. If 9 months are reckoned from 31/3/1967, the society as the ultimate purchaser would have been required to pay the balance amount by 31/12/1967. However, as a quid pro quo for ante dating the document Exhibit-J, the society got 9 more months to make payment i.e. upto 30/9/1968.

(d) Since the society had delayed the execution of the sale deed, if the society had not agreed for ante dating the document, there was every possibility that the vendor would insist upon the society to bear enhanced tax liability payable under the Finance Act 2 of 1967.

(e) The society agreed for ante dating the document to give colour of title to the demolition of the bungalow undertaken by the society in August, 1967. Since the property in question was custodia legis- in the hands of the receiver appointed by the Court, the society could not have commenced demolition of the main bungalow standing on the property in question before completion of sale. Thus, ante dating the deed of conveyance gave sanctity to the demolition of the main bungalow undertaken by the society in August, 1967.

(f) Evidence of Mr.Phadke, learned solicitor for the society and the evidence of Dr.Johari, secretary of the society clearly show that the society was aware of the fact that the document was ante dated with a view to cheat the tax authorities.

Mr.Dada submitted that in the face of such voluminous evidence on record, the finding given by the learned trial Judge that the society was not privy to the designs of the vendor in defrauding the revenue and that there was no accompanying mens rea on the part of the society in cheating the revenue is wholly erroneous.

18. Mr.Dada further submitted that the very fact that the society by its letter dated 30/11/1967 (Exhibit A-172) falsely represented to the Sub-Registrar that the delay in submitting the document (ante dated) for registration was due to the illness of the office bearers of the society clearly shows that the society aided and abetted in the criminal conspiracy as contemplated under section 120A and 107 of the I.P.C. Such an ante dated document which is actuated by fraud on the revenue, which is intended to create a cloud on the plaintiff's title, such a document which is found to be forged is liable to be declared as void and cancelled. In this connection, he relied upon the decisions in the case of **Oodeychand Boodaji V/s. Bhaskar Jagonnath (I.L.R.6 Bom.371), Emperor V/s. Jorabhai (A.I.R.1926 Bom.555), Calcutta Chromotype Ltd. V/s. Collector of Central Excise [(1998) 3 S.C.C.681], Usha Harshadkumar Dalal V/s. Org.Systems & Ors.[(2000)1 S.C.C. 742], Everest Coal V/s. State of**

Bihar (A.I.R. 1977 S.C. 2304), Kanhaiyalal V/s. Dr.D.R.Banaji (A.I.R.1958 S.C.725), Pranballa V/s. Tulsibala Dassi (A.I.R.1958 Cal.713), Sabava V/s. Yamanappa (A.I.R.1933 Bombay 209) and Immani Appa Rao V/s. G.Ramalingamurthi (A.I.R.1962 S.C.370).

19. Counsel for the plaintiff further submitted that where the consideration or object of a conveyance is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law, or, a document which is fraudulent or involves or implies injury to the person or property of another or a document which the Court regards as immoral or opposed to public policy, then such a document being void must be cancelled. In this connection, he relied upon the decisions in the case of **Kamarbai V/s. Badrinarayan [(1977) Mah.L.J.115], Gurmuksingh V/s. Amarsingh [(1991) 3 S.C.C.79], S.B. Norarana V/s. Prem Kumari Khanna (A.I.R.1980 S.C.193), Waman Kini V/s. R. Bhagwandas & Co. (61 Bom.L.R.1011)** and **Angarki Co-op.Hsg.Soc.Ltd. V/s. State of Maharashtra [(1997) 9 S.C.C. 713]**.

20. Learned counsel for the plaintiff further submitted that where a conveyance is expressly or by implication is forbidden by statute, no Court would lend its assistance to give effect to it and if the law

provides penalty in respect of a particular act or contract, such act or contract would be void as prohibited by law because such penalty would imply prohibition. He submitted that fraud, forgery or illegality would completely vitiate the document and would 'rob it of all legal effect' and, therefore, regardless of the alleged innocence of any of the parties, the document itself cannot stand and must be declared to be void and cancelled. In this connection, he relied upon the decision of **Mannalal Khetan V/s. Kedar Nath Khetan [(1977) 2 S.C.C.425], Vishwa Vijay Fakhrul Hassan (A.I.R. 1976 S.C.1485), Krishna Yadav V/s. State of Haryana [(1994) S.C.C.165] and Ram Chandra Singh V/s. Savitri Devi [(2003) 8 S.C.C.319]**.

21. Relying upon the decision of the Apex Court in the case of **R.K.Dalmia V/s. Delhi Administration (A.I.R. 1962 S.C.1821)**, the counsel for the plaintiff submitted that the conduct of the society was not bona fide since it took part in ante dating, which in law amounts to forgery and, therefore, such a forged document ought to have been cancelled.

22. The learned counsel for the plaintiff further submitted that mens rea is not an essential ingredient in a Civil proceedings unlike in Criminal proceedings. He

submitted that even if the society had no intention to deceive the revenue, the very fact that the society participated in suppressing the truth and permitted forgery was sufficient to cancel the document. The learned counsel further submitted that even assuming that the conduct of the society is bonafide, such a bonafide conduct is not a defence where there is an illegality, as it is settled law that in the case of illegality, for example, violation of F.S.I. rules and building regulations, buildings have been ordered to be demolished irrespective of the bonafides of the flat purchasers or the hardships they may suffer. In this connection, he relied upon the decisions in the case of **Peek V/s. Gurney [(1871) 13 Eq.113 (per Lord Romilly) Per Lord Cairns in L.R.6 H.L.409, Bowen V/s. Evans [(1848) 2 H.L.C.257], Derry V/s. Peek [(1889 L.R.14 A.C.377], Bombay Environmental Action Group V/s. B.M.C.[(1995) 2 Bom.C.R.233], Surasaibalini V/s. Phanindra (A.I.R.1965 S.C.1364) and M.I.Builders V/s.Radhey Shyam Sahu (A.I.R. 1999 S.C.2468), Kamdas Shenoy V/s. Udupi Municipality (A.I.R.1974 S.C.2177) and Shivajirao Nilangekar Patil V/s. Mahesh Madhav Gosavi (A.I.R.1987 S.C.294)**.

23. Referring to the powers of the Court to order cancellation of a document under section 31 of the Specific Relief Act, 1963, the learned counsel for the

plaintiff submitted that the said section 31 is not confined to suits for cancellation of an instrument by a party to the instrument. The section is based on the principle of protective and preventive justice and the Court will not be justified in exercise of its discretion to refuse cancellation merely because the instrument being void, could always be ignored in the eye of law and a decree for its cancellation was not necessary. For this proposition, the learned counsel relied upon the decisions in the case of **Mahadeo Deoji V/s. Nana Banaji (A.I.R.1946 Nag.359), Vemana V.Sastri V/s. Sayed Vilijan (A.I.R.1951 Madras 399) and Chajulal V/s. Goku (A.I.R.1952 M.B.168).**

24. Lastly, the learned counsel submitted that when the execution of a deed raises a cloud upon the reversionary rights, it is enough if the reversioner brings a suit under section 31 of the Specific Relief Act. He submitted that the execution of a deed which is injurious to the rights of the reversioners, gives them a cause of action and a right to have the deed declared null and void as against them when there is reasonable apprehension that the said deed may be used to cause injury to the plaintiff at some future time. He submitted that the plan annexed to Exhibit-J is also so drawn as to suggest that a portion of the Ratan Villa property has been transferred to the trust, so as to give an impression

as if clause 9 of Exhibit A-112 (agreement to waive height restriction) had been acted upon. This has been done to cast a cloud on title of the trust property so that with the passage of time, the contents of para 9 of Exhibit A-112 are accepted as correct. He submitted that there is a real apprehension of the society producing at some later date, the plan which is alleged to be annexed to Exhibit A-112 (but which has never been produced yet) or the society on the basis of the incorrect plan annexed to the deed (Exhibit-J) may claim rights to lands what is presently trust property and, therefore, it is absolutely essential in the interest of justice to cancel the deed itself. He submitted that independent of the injury to the plaintiff/trust by reason of the cloud on title, the plaintiff as a tax payer or as a citizen has a locus to initiate action for cancellation of a document which is fraudulently executed with a view to defraud the revenue and that too by an officer of the Court. He submitted that the declaration granted by the trial Judge cannot operate as amending the plan annexed to the conveyance Exhibit-J and the said plan would prevail over the area referred to in the document. The counsel further submitted that no prejudice would be caused to the society if the deed Exhibit-J is cancelled, because, under the consent terms filed on 29/10/1980 in Suit No.1098 of 1979 (Exhibit A-169) the vendor has agreed to execute such

documents and assurances as may be required by the society so as to perfectly and effectively vest the said property in favour of the society in case any adverse order is passed in Suit No.942 of 1973. He submitted that the findings of the learned trial Judge that the deed need not be cancelled because the plaintiff is always vigilant to guard against mischief, amounts to penalising the plaintiff for being vigilant. For all the aforesaid reasons, the learned counsel submitted that the Judgment of the trial Judge in refusing to cancel the deed of conveyance Exhibit-J be set aside and the suit be decreed with costs as prayed for in the plaint and the document Exhibit-J be ordered to be cancelled forthwith.

25. Mr.J.B.Chinai, learned senior advocate appearing on behalf of the purchaser-society on the other hand, fairly stated that the decision of the learned trial Judge having not been questioned, the society is bound by the findings given by the learned trial Judge and his endeavour shall be to support the conclusion of the trial Judge that in the facts and circumstances of the case the cancellation of Exhibit-J is not warranted.

26. According to Mr.Chinai, the grievance of the plaintiff that the society has benefited by ante dating the conveyance Exhibit-J is totally incorrect. He

submitted that neither in the plaint which was amended on four occasions the plaintiff has pleaded that the society was benefited by ante dating nor any such issue was raised or canvassed or argued before the learned trial Judge. He submitted that initially the society by its letter dated 13th December, 1965 (Exhibit A-50) had agreed to purchase Ratan Villa property at the rate of 640 per sq.yds. on the basis of F.S.I.-2 available for construction on the said lands. When the F.S.I. was reduced from 2 to 1.33, the society prevailed upon the vendor and Mr.Zaveri to reduce the consideration amount and accordingly, the draft conveyance deed was approved by the parties on 29/3/1967 wherein, the total consideration amount in respect of 5765 sq.yds.is shown at Rs.21,50,000/-. Thus, from the approved draft conveyance deed dated 29/3/1967 (Exhibit A-133) which is not even disputed by the plaintiff, it is clear that the reduction in the consideration amount was not in lieu of the society agreeing to ante date the document. He submitted that as rightly held by the learned trial Judge, the society agreed to ante date the document only because the vendor wanted to avail tax benefits and there is nothing on record to suggest that the society was aware of the fact that by ante dating the vendor wanted to defraud the revenue. He submitted that neither the agreement between the vendor and Zaveri dated 2/7/1966 (Exhibit A-111) nor the agreement for sale

between Zaveri and the society dated 23/7/1966 (Exhibit A-112) has been challenged in the suit and, therefore, it is not open to the plaintiff to contend that if Exhibit-J is not cancelled then clause 9 in the agreement for sale dated 23/7/1966 (Exhibit A-112) which relates to waiver of height restrictions may come into operation so as to adversely affect the interest of the plaintiff. He submitted that the agreement to waive height restriction contained in clause 9 of the agreement for sale dated 23/7/1966 (Exhibit A-112) is not even recited in the conveyance and, therefore, the question of clause 9 in the agreement dated 23/7/1966 coming into operation does not arise at all. In any event, the counsel submitted that once conveyance is executed the agreement for sale looses its efficacy and, therefore, there is no merit in the above contentions raised by the plaintiff.

27. Mr.Chinai further submitted that the cartographical encroachment in the plan annexed to Exhibit-J was only an error because from the contents of the deed of conveyance it can be seen that there was no intention to encroach upon the trust property and in fact there is no physical encroachment of the trust’s property by the society. The society has accepted the decree passed in Suit No.891 of 1970 wherein it is declared that the part of the trust property wrongly included in the

plan annexed to the deed Exhibit-J does not belong to the society. In these circumstances, it cannot be said that the society agreed for ante dating the document with a view to obtain cartographical encroachment upon the trust land.

28. Mr.Chinai further submitted that the society has not misled the Municipal authorities by addressing letters stating therein that the conveyance has already been executed in favour of the society. What was actually meant in those letters was that the society on finalisation of the deal has already entered into an agreement for purchase of the property. Even the Municipal authorities were not misled by the said letters and in fact in reply to the society's letter, the Municipal authorities have called upon the society to furnish a copy of the agreement for sale and not the conveyance. Therefore, it cannot be said that the society agreed for ante dating with a view to save itself from the misrepresentation made to the municipal authorities. As regards the demolition work of the main Bungalow undertaken by the society in August, 1967, Mr.Chinai submitted that under the agreement for sale dated 23/7/1966, the society was entitled to undertake demolition of the Bungalow even before the conveyance was executed in favour of the society. Therefore, it cannot

be said that the society agreed for ante dating the document with a view to give colour of sanctity to the demolition work undertaken by the society.

29. Mr.Chinai further submitted that the contention of the plaintiff that ante dating was a quid pro quo for saving the society from the consequences of termination is also incorrect. He submitted that no material is placed on record to show that either the original vendor or Zaveri wanted to terminate the agreement for sale. As regards the allegation that the ante dating was a quid pro quo for suppressing height restriction, Mr.Chinai submitted that even in the final draft conveyance dated 29/3/1967 (Exhibit A-133) which is accepted by the plaintiff to be genuine, there is no reference to the height restriction and, therefore, it is not open to the plaintiff to contend that the society agreed for ante dating with a view to suppress height restriction.

30. In any event, Mr.Chinai submitted that in view of the decree passed in Suit No.891 of 1970, none of the grievances of the plaintiff survive and the apprehension of the plaintiff that the deed Exhibit-J may cause injury to the plaintiff is without any basis. The counsel submitted that the learned trial Judge has also protected the interest of revenue by directing that a copy of the

decree passed in Suit No.942 of 1973 be sent to the Commissioner of Income Tax, Bombay, for taking necessary action. Thus, the grievance of the plaintiff that the deed Exhibit-J is ante dated with a view to defraud the revenue and that the defective plan annexed to Exhibit-J as well as the omission to incorporate the restrictive covenants in the deed Exhibit-J casts a cloud on the plaintiff's property have been completely taken care of by passing the decree in favour of the plaintiff in both the suits. The counsel submitted that in Suit No.891 of 1970, the learned trial Judge has declared that the society is not the owner of the land shown by yellow hatched lines as more particularly shown in the plan Exhibit-B to the said suit and has permanently prohibited the society from laying any claim to the said land. As regards the height restriction is concerned, the learned trial Judge has perpetually prohibited the society from erecting any structure exceeding in height 13'-1.1/2" on the vacant land of the erstwhile Ratan Villa as it was on 20/3/1951. Moreover, in the decree passed in Suit No.942 of 1973, the learned trial Judge has declared that the deed Exhibit-J shall be inoperative and of no effect to the extent it expressly or by implication seeks to whittle down the rights of the trust, including the plaintiff. In these circumstances, the learned counsel submitted that the learned trial Judge was justified in holding that this is

not a fit case for ordering cancellation of the document.

31. Lastly, Mr.Chinai submitted that the object of executing the deed (Exhibit-J) was to lawfully convey title in respect of 5765 sq.yds. of land purchased by the society from the vendor for valuable consideration. It is not in dispute that the society is actually in possession of 5765 sq.yds. as set out in the deed Exhibit-J and the defects in the plan annexed to the said deed (Exhibit-J) pointed out by the plaintiff have already been redressed by the decree passed in the aforesaid two suits. As the society is lawfully entitled to a deed of conveyance, no useful purpose would be served by cancelling the deed Exhibit-J and driving the society to obtain a fresh deed of conveyance. The counsel for the society further submitted that it will be extremely difficult to obtain a fresh deed of conveyance because the original vendor has already died and all the original members of the society have also resigned. While granting relief, the Courts have to balance the equities on both sides and the discretion judiciously exercised by the learned trial Judge ought not be disturbed. In this connection, he relied upon the decisions of the Apex Court in the case of **State of Kerala V/s. Kumari T.P.Roshana and others (A.I.R. 1979 Supreme Court, 765), Wander Ltd. & Anr. V/s. Antox India Ltd.(1990 (Supp) Supreme Court Cases,**

272), The State of Gujarat & Anr. V/s. Shri Ambica Mills Ltd., Ahmedabad (A.I.R. 1974 Supreme Court, 1300) and **Muppadathi Pillai V/s. Krishnaswami Pillai & Ors. (A.I.R. 1980 Madras 1)**. Accordingly, Mr.Chinai prayed for the dismissal of the appeal as well as the cross-objection.

32. Mr.D'Vitre, learned advocate appearing for the cross objectionists adopted the arguments advanced by the learned counsel for the plaintiff .

33. On careful consideration of the rival submissions and on perusal of the documents placed before us, we are of the opinion that the discretion exercised by the learned trial Judge in declining to cancel the deed Exhibit-J is just and proper and the same need not be disturbed.

34. At the outset we appreciate the herculean task undertaken by the plaintiff in digging out facts from the reputed Solicitors and establish in Court that the deed of conveyance Exhibit-J executed in the year 1967 was ante dated with a view to defraud the revenue to the extent of Rs.3,14,848/-. The plaintiff as a beneficiary and reversioner under the trust created under the deed of settlement dated 17/3/1951 has also successfully

established that the deed of conveyance (Exhibit-J) casts cloud upon the property in which he has right, title and interest. With a view to protect the right, title and interest of the trust property and to avoid the said deed Exhibit-J to the extent it affects his rights, the plaintiff had filed Suit No.891 of 1970. The said suit has been decreed by granting relief as claimed in the plaint. During the pendency of the said suit the plaintiff apprehended that even after a decree is passed in the said suit if the deed of conveyance is allowed to stand it may cause serious injury to the plaintiff. Therefore, the plaintiff filed suit No.942 of 1973 seeking cancellation of the deed of conveyance Exhibit-J. The learned trial Judge in exercise of his discretion has held that the facts of the case do not warrant cancellation of the deed and grant of declaration as prayed for would serve the ends of justice. The question before us is, whether the discretion exercised by the learned trial Judge is just and proper.

35. Section 31 of the Specific Relief Act, 1963 empowers the Court to order cancellation of an instrument / document. The said section reads as under:-

> "31. **When cancellation may be ordered** :- (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it

> adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
>
> (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.'

36. Thus, under section 31 of the Specific Relief Act, the Court, on adjudication of the void or voidability of a written instrument, if satisfied, may order cancellation of that instrument. If the void or voidability of a written instrument is already adjudicated upon by the Court, then the question of adjudicating that instrument in a suit filed under section 31 of the Specific Relief Act does not arise at all. In other words, once a document on adjudication is avoided by passing a decree, the question of adjudicating its void or voidability under section 31 of the Specific Relief Act does not arise at all. In the present case, on filing Suit No.891 of 1970 the Court adjudicated upon the deed Exhibit-J and passed a decree in favour of the plaintiff so as to avoid the deed Exhibit-J to the extent it effects the right of the plaintiff. Therefore, adjudicating the void or voidability of the deed of conveyance Exhibit-J in the suit (Suit No.942 of 1973) filed by the plaintiff under section 31 of the Specific Relief Act does not

arise.

37. Even assuming that the void or voidability of the deed of conveyance Exhibit-J could be adjudicated upon in Suit No.942 of 1973 in view of the fact that Suit No. 891 of 1970 was not adjudicated upon on the date of filing Suit No.942 of 1973, in the facts of the present case, we are of the opinion, that the learned trial Judge was justified in holding that the deed Exhibit-J does not deserve to be cancelled. In the present case, it is not in dispute that pursuant to the contract entered into by and between the vendor and the purchaser, the society is entitled to a deed of conveyance from the vendor. It is not in dispute that the vendor had saleable right in the property sold under the deed of conveyance and the consideration paid by the society in respect thereof is lawful consideration. None of the clauses set out in the body of the deed Exhibit-J affect the right of the plaintiff. The grievance of the plaintiff, who is not a party to the deed is that the said deed Exhibit-J casts a cloud on the title of the plaintiff’s property and is prejudicial to the interest of the plaintiff, because, the plan annexed to the deed Exhibit-J fraudulently purports to convey to the society part of the adjoining land to which the plaintiff is entitled to and that the deed Exhibit-J does not incorporate the height restrictions

attached to the land conveyed by the said deed. In the Suit No.891 of 1970 plaintiff prayed for a declaration that the deed Exhibit-J is invalid in so far as the plaintiff is concerned and the Court has decreed that the society is not the owner of the land shown by yellow hatched lines in Exhibit-B to the said suit and that the said land belongs to the trust, its beneficiaries and reversioners, including the plaintiff. By the said decree the society is permanently prohibited from laying any claim to the said land or interfering with the possession and enjoyment thereof by the trustees, beneficiaries and reversioners, including the plaintiff. Further, by the said decree, the Court has perpetually prohibited the society from erecting any structure exceeding in height 13′ - 1.1/2" on the vacant land purchased by the society. In our opinion, the decree passed in the plaintiff's Suit No.891 of 1970 completely avoids the deed Exhibit-J in so far as the plaintiff is concerned and removes the cloud cast upon the title of the plaintiff's property by the said deed. In other words, the decree passed in Suit No.891 of 1970 validates the deed of conveyance Exhibit-J qua the plaintiff by removing the deficiencies in the deed Exhibit-J which were pointed out by the plaintiff. Moreover, the decree passed in Suit No.942 of 1973 further declares that the deed Exhibit-J shall be inoperative and of no effect to the extent it expressly or by implication

seeks to whittle down the rights of the plaintiff. Thus, the decree passed in both the aforesaid suits which have attained finality as far as the vendor and the purchaser are concerned, completely remove the cloud cast upon the plaintiff's property and hence, the contention of the plaintiff that even after the decree passed in the two suits the deed Exhibit-J would cause serious prejudice to the plaintiff, if allowed to stand, cannot be accepted. Accordingly, we are of the opinion, that the learned trial Judge was justified in holding that instead of cancelling the deed Exhibit-J, it is just and proper to avoid the deed Exhibit-J to the extent it affects the rights of the plaintiff by granting appropriate declaration as claimed by the plaintiff.

38. The apprehension of the plaintiff that the society may, at any time in future cause serious injury to the plaintiff by producing the agreement allegedly executed by Manchersha P.Mistry (referred to in clause 9 of the agreement for sale dated 23/7/1966 Exhibit A-112) regarding waiver of height restriction attached to the lands, does not merit acceptance, because firstly, in the deed of conveyance Exhibit-J there is no reference to the alleged agreement executed by Mr.Manchersha P.Mistry waiving height restriction and there is no evidence to establish that such an agreement was executed by

Manchersha P.Mistry. Secondly, the rights of the parties get crystalised on the basis of the deed of conveyance and not on the basis of the agreement for sale, and therefore, clause 9 in the agreement for sale dated 23/7/1966 has no sanctity after the execution of the deed Exhibit-J. Thirdly, by the decree passed in Suit No.891 of 1970, the society is perpetually prohibited from erecting any structure exceeding in height 13’ - 1.1.2" on the vacant land purchased by it under the said deed of conveyance and the said decree has attained finality. Similarly, the defect in the plan annexed to Exhibit-J has also been taken care of by passing appropriate decree in favour of the plaintiff. Therefore, the apprehension of the plaintiff that the society may some time in future rake up the issue of height restriction or claim the trust land fraudulently included in the plan annexed to Exhibit-J is wholly unsustainable.

39. It was next contented that as a responsible citizen the plaintiff has a right to seek cancellation of a document which is found to be ante dated with a view to defraud the revenue. It is true, as submitted by the learned counsel for the plaintiff, that where a document is expressly or impliedly forbidden by a statute, no Court would lend its assistance to give effect to such a document. Therefore, the question to be considered in the

present case is, whether, the deed Exhibit-J is expressly or impliedly prohibited by a statute ? As stated earlier, in the present case, the object and consideration in executing the deed Exhibit-J is to lawfully convey part of the land belonging to the vendor to the society for lawful consideration. Thus, no fault can be found in executing the deed Exhibit-J, except to the extent it is ante dated with a view to defraud the revenue namely the income tax. The very fact that the society participated in ante dating the document may render the society liable for penal action. But the act of ante dating the document will not render the entire document void. If the consideration or object in executing the document is lawful, then the mere ante dating that document would not render the entire document void. In other words, a document which is otherwise valid would not become wholly invalid or void merely because it is ante dated.

40. The Apex Court in the case of **Canbank Financial Services Ltd. V/s. Custodian and others [(2004)8 Supreme Court Cases, 355]** while dealing with the validity of the transactions in an agreement which are partly legal and partly illegal held at para 79 & 84 as follows:-

> "79. A contract may be unlawful or partly lawful or partly unlawful. If it is lawful, it will be given effect to whereas in case it is wholly

> unlawful being opposed to the public policy, it would not be. In case a transaction is partly lawful and partly unlawful, if they are severable, the lawful part shall be given affect to (See B.O.I. Finance Ltd.).
>
> .....
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> 84. Right, title and interest in a movable property can pass by delivery of possession and upon paying of the considerations in view of the provisions of the Sale of Goods Act. Passing up of a title in favour of the transferee would not be illegal, unless it is forbidden by law. For the said purpose, the transaction must attract the wrath of section 23 of the Contract Act and not otherwise. Section 3 of the Act does not contemplate extinction of right of a third party. For getting the transaction invalidated in law, only Section 4 of the Act can be taken recourse to."

Applying the aforesaid ratio laid down by the Apex Court to the facts of the present case, it is seen that the deed of conveyance Exhibit-J has been lawfully executed to transfer the property belonging to the vendor in favour of the purchaser society. It is not in dispute that the vendor had saleable interest in the property and that the society having paid the valuable consideration in respect thereof is entitled to a deed of conveyance. The act of executing a deed of conveyance to transfer lawfully the right, title and interest in the property and the act of ante dating that deed with a view to defraud the revenue are totally independent of each other. In other words, the act of lawfully conveying the immovable

property is severable from the act of ante dating the document. Therefore, in the present case, validly executed deed Exhibit-J cannot be said to be totally void merely because it is ante dated. In this view of the matter, we are of the opinion that the learned trial Judge was justified in holding that irrespective of the fact that the deed Exhibit-J was ante dated with a view to defraud the revenue, the deed Exhibit-J can be saved and need not be cancelled. As a measure of remedial action, the learned trial Judge has directed that a copy of the decree passed in Suit No.942 of 1973 be forwarded to the Commissioner of Income Tax, Bombay so that appropriate action can be taken in the matter. As stated earlier, the decree passed in the two suits completely protect the interest of the revenue and also the interest of the plaintiff to the extent Exhibit-J impairs the rights of the plaintiff and there is no merit in the contention that if the deed Exhibit-J is allowed to stand it may still cause serious injury to the plaintiff.

41. We do not consider it necessary to deal with various decisions cited by the learned counsel for the plaintiff, because the ratio laid down in those cases are not in dispute. Void or voidability of a document is to be seen in the facts of each case. In the facts of the present case, we are of the opinion that the learned trial

Judge on evaluation of the evidence on record has rightly come to the conclusion that instead of cancelling the deed Exhibit-J, the interest of the revenue and the interest of the plaintiff can be protected by granting declarations as more particularly set out in the decree passed in the two suits filed by the plaintiff.

42. Before we close, we record that the original coveyance deed (Exhibit-J) and the other original documents which were part of the evidence were not available in the Court during the course of hearing. The Court Associate informed us that despite the requisition sent to the Registry, the original conveyance deed (Exhibit-J) and the other original documents were not sent, being not traceable. We direct the Registrar General to hold an enquiry into this serious lapse and identify the the erring official and take suitable disciplinary action against him/her. The Registrar General shall also ensure that the original conveyance deed (Exhibit-J) and other original documents are traced without any delay and submit the report to that effect before us.

43. For all the aforesaid reasons, we see no merit in the appeal and the cross-objection and accordingly the same are dismissed with no order as to costs.

Sd/-

(R.M.LODHA, J.)

Sd/-

(J.P.DEVADHAR, J.)